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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Shiloh Industries, Inc.

File: B-235949

Date: October 3, 1989

DIGEST

1. Protest that specification is impossible to meet is dismissed as untimely when not filed before initial closing date for receipt of proposals.
2. Contention first raised in comments on agency report that agency should have held discussions with the protester before rejecting its proposal as technically unacceptable is dismissed as untimely where it is not filed within 10 working days after the protester receives notice of the rejection of its proposal.

DECISION

Shiloh Industries, Inc., protests the rejection of the offer it submitted in response to request for proposals (RFP) No. DLA900-89-R-0069, issued by the Defense Logistics Agency for timing mechanisms.

We dismiss the protest.

The RFP was issued on October 31, 1988, for timing mechanisms, manufactured in accordance with Army Drawing No. SM-C-915696. The timing mechanism drawing lists a semiconductor phototransmitter, manufactured in accordance with Army Drawing No. SM-A-915741, as one required component of the timing mechanism. The semiconductor drawing provides that the semiconductor sought "is similar to commercial type TIL-602." The drawing also identifies Texas Instruments part No. LS 6276 as a suggested source of supply, but cautions that the listing is not to be construed as a guarantee of present or continued availability as a source of supply for the item.

Shiloh contacted Texas Instruments to procure the semiconductor and was advised that Texas Instruments no longer manufactures the part, but that its part No. TIL-602 was the commercial equivalent and the recommended alternate.

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Six offerors responded to the solicitation by November 30, the closing date for proposals. Shiloh submitted its proposal contingent upon being granted approval to use part No. TIL-602. Shiloh's proposal was submitted to the agency's technical team for evaluation to determine if it met the requirements of the specification. The proposal was subsequently found technically unacceptable and eliminated from the competitive range because the semiconductor it proposed, Texas Instruments part No. TIL-602 did not meet the military specification testing requirements set out in paragraphs 4.2 and 4.3 of the semiconductor drawing. Subsequently, after holding discussions with and receiving best and final offers from the other offerors in the competitive range, DLA awarded the contract to Target Corp., the low acceptable offeror for the desired quantity of timing mechanisms.

Shiloh protests that it knows of no vendor that can currently manufacture a semiconductor tested in accordance with the drawing and thus that the specification is impossible to meet, and further, that if DLA knows of other vendors that manufacture compliant semiconductors, it should have informed all offerors of these sources. Shiloh also protests that DLA improperly awarded the contract to Target at a price higher than that offered by Shiloh. Finally, in its reply to the agency report on the protest, Shiloh complains that DLA should have held discussions with Shiloh concerning the testing requirements for the semiconductors.

DLA first argues that Shiloh's protest should be dismissed as untimely because Shiloh is protesting that the RFP did not permit alternate offers--a defect apparent from the face of the solicitation--but did not submit the protest until after November 30, the closing date for the receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989).

We disagree that the protest is untimely on this basis because we do not believe that Shiloh is protesting that the RFP does not permit alternate offers. We do find, however, that the protest is untimely to the extent Shiloh is protesting that the specification is impossible to meet, and that, if DLA knew of vendors that could supply a transmitter meeting the specification, it should have informed all offerors under the solicitation.

Under our regulations, a protest based upon an alleged impropriety that is apparent from the face of an RFP must be filed prior to the closing date for the receipt of

proposals. 4 C.F.R. § 21.2(a)(1). Here, as evidenced by its protest submission, Shiloh learned while it was preparing its offer that Texas Instruments no longer manufactured the tested part, that the commercial part number did not fully meet the specifications and that it was unaware of any vendor that could supply a fully acceptable transmitter. Shiloh was therefore required to protest that the specification was impossible to meet and that DLA should inform offerors of other acceptable vendors before the closing date for initial proposals, November 30, 1988. Since Shiloh did not file its protest until June 22, 1989, it is clearly untimely on this basis.

Shiloh's contention that DLA should have held discussions with Shiloh concerning the testing requirement also is untimely. New and independent grounds of protest which are raised after the initial protest is filed must independently satisfy our timeliness requirements. Oxford Project, Inc., B-228461; B-228461.2, Feb. 17, 1988, 88-1 CPD ¶ 156. Under our regulations, a protest concerning other than an apparent solicitation impropriety must be filed within 10 working days after the basis of protest is or should be known. 4 C.F.R. § 21.2(a)(2).

Here, Shiloh knew that its proposal had been rejected without discussions no later than June 15, when it received notice that DLA was rejecting its offer. Since Shiloh did not raise this basis of protest until it filed its comments on the agency report on August 11, considerably more than 10 working days after Shiloh learned the protest basis, it is clearly untimely.

In any event, once DLA determined that Shiloh's proposal was technically unacceptable for failing to meet the specifications, DLA was not required to hold discussions with the firm. See Midland Brake, Inc., B-225682, June 3, 1987, 87-1 CPD ¶ 566; Thomas Eng'g Co., B-220393, Jan. 14, 1986, 86-1 CPD ¶ 36. This is true even though Shiloh offered the low price. See All Star Dairies Inc., B-209188, Jan. 31, 1983, 83-1 CPD ¶ 107. In this regard, we note that a technically unacceptable offeror can be excluded from the competitive range irrespective of its low price. Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.

The protest is dismissed.



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